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PENGURUSAN DANAHARTA NASIONAL BHD

v.

DATO' SNG CHEE HUA & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-22-3113-1998]
25 MAY 2006

C ***CIVIL PROCEDURE:*** *Pleadings - Oral testimony deviating from pleadings - Whether court will allow - Extent to which defence bound by statement of defence - Defendant to plead particulars of all material facts in his defence - Failure to plead particulars of purported representation - Evidence of representation inadmissible - Rules of the High Court 1980, O. 18 r. 12(1)(a)*

D ***EVIDENCE:*** *Burden of proof - Onus on party asserting a fact to adduce cogent evidence of such fact - Whether existence of oral agreement sufficiently proved - Opponent need not adduce rebuttal evidence where initial legal burden of proof not discharged - Evidence Act 1950, ss. 91, 92*

E ***CONTRACT:*** *Parol evidence - Contract reduced to writing - Oral statements made prior to contracting - Effect of statement not in contract nor inconsistent with it - Whether admissible - When such statements admissible - Terms of letter of offer of overdraft facility should not exclusively be determined within its four corners but in context of surrounding circumstances - Evidence Act 1950, ss. 91, 92*

F ***CONTRACT:*** *Breach - Oral representation - Whether representation amounted to collateral warranty - Where terms of alleged collateral agreement inconsistent with terms and conditions of original agreement - Whether evidence of collateral agreement admissible - Evidence Act 1950, ss. 101, 103*

G Bangkok Bank Berhad (the original plaintiff) in this case granted the first and second defendants an overdraft facility of RM17,000,000 ('the facility') each. Subsequently the first and second defendants defaulted and the plaintiff issued a writ of summons against them. Later all rights and interest of the original plaintiff in respect of the facility granted to H the defendants were assigned to the Pengurusan Danaharta Nasional Berhad (the present plaintiff). The full hearing of the suit only concerned the second defendant since a consent judgment had been recorded as between the plaintiff and the first defendant. The second defendant claimed that the plaintiff was aware that the facility was granted solely I for the benefit of the first defendant, and that the plaintiff had represented to the second defendant that in the event of default only the first defendant would be liable. According to the second defendant, there

was a representation to this effect made by one Albert Check, the then Chairman of the original plaintiff. This alleged representation was not pleaded in the second defendant's statement of defence but was raised for the first time in the second defendant's witness statement which was tendered into court as his evidence during examination in chief. Therefore, the plaintiff contended that evidence as regards the purported representation was inadmissible. The second defendant claimed that the plaintiff had failed to contradict his evidence on the issue of representation as the plaintiff did not call Albert Check to rebut the evidence.

Held (allowing plaintiff's claim):

(1) It is incumbent on a party who relies on any fact that is material to his defence to plead particulars of such facts. Failure to observe the rule strictly would result in evidence of such representation being ruled as inadmissible. As the parties are circumscribed by their pleadings, it was improper for the second defendant to adduce evidence on the purported representation at the trial through his oral or witness statement affidavit. Hence, no weight should be attached to the second defendant's evidence on the issue of the purported representation. Bereft of any evidence of the alleged representation, the second defendant's defence on this score was a mere bare allegation without proof. (para 11)

(2) It was the second defendant who asserted that that there was an oral agreement between the plaintiff and the second defendant that the overdraft facility was for the sole benefit of the first defendant. Thus, the onus was on the second defendant to satisfy the court with cogent evidence that such an arrangement in fact existed. (para 13)

(3) Where there is a prior oral agreement or a statement verbally agreed to by the parties at the time of execution of a document, pertaining to a matter on which the document is silent, evidence as to its nature, factual background or surrounding circumstances may be given when such oral agreement is not inconsistent with or does not contradict the terms of the document. As such, the effect of the terms of the letter of offer of the overdraft facility should not exclusively be determined within the four corners of the document itself but in the context of the circumstances surrounding the transaction. However, the second defendant had failed to adduce any such evidence. (paras 14 & 15)

(4) The plaintiff did not need to adduce any rebuttal evidence on the issue of the alleged arrangement since the second defendant had failed to discharge the initial legal burden imposed on him. (para 15)

(5) The second defendant's allegation that he was not liable under the facility was inconsistent with the terms and conditions of the offer letter. Hence, the evidence of the purported collateral agreement for the purpose of contradicting the terms and condition of the facility agreement was inadmissible. The provisions of ss. 91 and 92 of the Evidence Act were applicable against the second defendant. (para 19)

Case(s) referred to:

Keong Huat Film Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC ***(refd)***

Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139 ***(refd)***

Tan Chong & Sons Motor Co Sdn Bhd v. Alan Mcknight [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 FC ***(refd)***

Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ Supp 147 HC ***(refd)***

UN Pandey v. Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 ***(refd)***

Wong Chong Chow v. Pan-Malaysian Cement Works Bhd [1980] 2 MLJ 75 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 91, 92(b), 101, 103

Rules of the High Court 1980, O. 18 r. 12(1)(a)

For the plaintiff - Gideon Tan (SW Chow with him); M/s Gideon Tan Razali Zaini
For the 2nd defendant - Joseph Yeo; M/s Joseph Yeo

Reported by Amutha Suppayah

JUDGMENT

Vincent Ng J:

Background facts

[1] The following facts are undisputed. Through a letter of offer dated 10 May 1996 and 17 May 1996 (see pp 1-10 of IDB) respectively, Bangkok Bank Berhad (the original plaintiff) granted the first and second defendants an overdraft facility of RM17,000,000 ('the facility') each. As security, four properties (see pp 15-73 of IDB) were charged in favour of the original plaintiff. Other than the said immovable properties, the second defendant had also provided a letter of set off over a fixed deposit of RM10,000,000. The terms of the facility are *inter alia*:

(a) the defendants shall pay interest on the overdraft facility of 2% over the plaintiff's base lending rate calculated on monthly rests;

(b) upon default of the overdraft facility, the defendants shall pay interest at 1% above the prescribed rate on monthly rests or such rate as the original plaintiff may from time to time determine on all sum overdrawn whether in respect of principal or interest of all other sums covenanted to be paid on demand and such interest shall be capitalized.

[2] Subsequently, at the request of the defendants and pursuant to a supplementary letter dated 11 September 1997 (see pp 11-14 of IDB) addressed to the defendants, the original plaintiff granted to the defendants an extension on the overdraft facility subject to certain terms and conditions contained therein. The first and second defendants defaulted. This caused the plaintiff to issue a letter of demand (see p 163 of IDB) dated 20 March 2001 demanding the sums of RM8,321,987.39 from the second defendant, being the outstanding sums due and payable to the plaintiff under the facility. However, the demand was not satisfied. Hence, on 28 August 1998 the original plaintiff took out a writ of summons coupled with a statement of claim against the defendants. On or about 31 January 2000, all present and future rights, title and interest of the original plaintiff in respect of the facility granted to the defendants were assigned to the Pengurusan Danaharta Nasional Berhad (the present plaintiff). To reflect the change of circumstances, on or about 9 November 2001, an application (encl. 27) was filed to substitute the original plaintiff with the present plaintiff. This was allowed on 17 January 2002.

The Full Hearing

[3] The full hearing of this suit only concerns the second defendant since a consent judgment has been recorded on 7 February 2006 as between the plaintiff and the first defendant. At the commencement of the trial both parties consented to mark all documents filed during case management as follows:

(a) The bundle of pleadings (ikatan pliding), marked as 'IP';

(b) The common bundle of documents (ikatan dokumen bersama), marked as 'IDB';

(c) Brief summary of plaintiff's case under O. 34 r. 4(2)(g) (ringkasan fakta-fakta kes plaintiff), marked as 'RKP';

A (d) The agreed issues and facts (isu dan fakta yang dipersetujui), marked as 'IFP';

(e) Witness statement affidavit of plaintiff under O. 35A, marked as 'PW1A; and

B (f) Witness statement affidavit of second defendant under O. 35A marked as 'DW1A'.

[4] It was agreed that all documents in Part B of IDB (there were no documents in Part A and C) were to be admitted into evidence with C their contents subject to cross-examination. Parties have unreservedly agreed that the trial would be restricted to only issue (b) in IFP namely: "whether there was an express or implied agreement between the plaintiff and the defendants whereby the facility granted pursuant to the letter of offer dated 17 May 1996 was for the benefit of the first D defendant only and only the first defendant is responsible to repay the outstanding amount due."

[5] The quantum has also been agreed at RM10,653,554.36 as at 30 April 2005 with interest agreed at the rate of 2% per annum above the base lending rate of Malayan Banking Berhad, and 1% per annum E above the prescribed rate in respect of the default interest calculated on monthly rests basis. On the issue of liability, *viva voce* evidence was taken and only two witnesses were called to testify, namely one each from both sides. The plaintiff called one Teh Lip Say (PW1), the assistant manager in charge of the original plaintiff's customer services F department and the second defendant (DW1) gave evidence in his own defence.

The Second Defendant's Defence

[6] The crux of the second defendant's defence is that the original G plaintiff was aware that the facility was granted solely for the benefit of the first defendant, and that the original plaintiff had represented to the second defendant that in the event of default only the first defendant would be liable. Paragraph 3 of the second defendant's defence bears quotation:

H > 3. 2nd Defendant further avers that the Plaintiff was, at the material time, fully aware that the 1st Defendant would be fully responsible and liable for the facilities granted by the Plaintiff to the 2nd Defendant, and that the Plaintiff had expressly or impliedly agreed to this arrangement by the Plaintiff's knowledge of this arrangement and conduct.

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[7] However, the second defendant has failed to condescend upon particulars of the purported arrangement to exclude his liability in the event of default. In his witness statement (DW1A) which was tendered into court, the second defendant elaborated on the purported arrangement as follows:

> I was told by Dato's Sng that he wanted to borrow RM50 million from Bangkok Bank Berhad but the bank could only lend a maximum of RM17 million per single account. He told me that the bank agreed to lend him RM50 million but asked him to provide the names of 2 persons so that the account could be split into 3 borrowers. He asked me to use my name as one of the borrowers. The other person was Koh Teiw King. That was how the letter was issued to me.

[8] To buttress his defence, the second defendant denied utilizing the facility. He alleged that on the first defendant's instruction, he instructed the bank to credit the draw down into the first defendant's current account. In answering question no. 6 in DW1A he deposed:

> (Q) 6: Did the bank know and agree that Dato' Sng was only using your name to obtain the facility?
>
> (A) Yes. The chairman of the bank (the original plaintiff) at that time Albert Cheok knew and he was the one who arranged the facility for Dato' Sng. The chairman told me not to worry about my name being used because the fixed deposit of RM10,000,000 in the name of Dato' Sng's wife and the lands pledged as collateral were enough to pay off the loan in the event Dato' Sng defaulted.

[9] So, it is the second defendant's contention that the purported arrangement to exclude his liability in the event of default was allegedly made through the representation by one Albert Cheok, the then chairman of the original plaintiff. It is common ground that that this alleged representation was not pleaded in the second defendant's statement of defence.

The Court Findings

[10] The allegation of the existence of the purported representation allegedly made by Albert Cheok was raised for the first time in the second defendant's witness statement which was tendered into court as his evidence during examination in chief. It is the plaintiff's contention that as the second defendant seeks to rely on the purported representation, he should have pleaded in his defence and condescended upon particulars of such fact if at all it existed. This, the second

A defendant had failed to do and consequently, evidence as regards the purported representation is inadmissible. Order 18 r. 12(1)(a) of the Rules of the High Court 1980 (RHC) states:

> (1) Subject to paragraph (2) every **pleading must contain the necessary particulars of any claim, defence,** or other matter pleaded including, without prejudice to the generality of the foregoing words
>
> (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence **on which the party pleading relies:** and (emphasis added)
>
> (b) …

[11] Order 18 r. 12(1) of the RHC stipulates that it is incumbent on a party who relies on any fact that is material to his defence such as a representation to plead particulars of such facts. Failure to observe the rule strictly would result in evidence of such representation being ruled as inadmissible. As the parties are circumscribed by their pleadings, it is improper for the second defendant to adduce any evidence on the purported representation at the trial. Hence, in my judgment, no weight should be attached to the second defendant's affidavit and oral evidence on the issue of the purported representation. Bereft of any evidence of the alleged representation, the second defendant's defence on this score is a mere bare allegation without proof.

[12] Be that as it may, I shall now take a step further to consider the true merit of the second defendant's defence based on this sole issue. It was contended by the second defendant that the plaintiff had failed to contradict the second defendant's evidence on the issue of representation, as the plaintiff did not call Albert Cheok to rebut the second defendant's evidence. It was further contended by the second defendant that the court should not accept the evidence of the plaintiff's sole witness (PW1) as she had no personal knowledge about the existence of such arrangement, and she had admitted that she was not a member of the loan committee when the loan was granted. Even so, in my view the pertinent issue for determination is: on whom rests the burden of proof on the issue of the existence of the alleged representation.

[13] It was the second defendant who asserted that there was an oral agreement between the original plaintiff and the second defendant that the overdraft facility was for the sole benefit of the first defendant, and that he would not be held liable in the event the first defendant defaulted. Thus, the onus is on the second defendant to satisfy the court with cogent evidence that such an arrangement in fact existed. Sections 101 and 103 of the Evidence Act 1950 ('the Act') read as follows:

101 Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that these facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

103 Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

[14] It is trite law that ss. 91 and 92 of the Evidence Act 1950 do not entirely preclude the admission of oral evidence to vary the terms of a contract which have been reduced to the form of a document. Thus, where there is a prior oral agreement or a statement verbally agreed to by the parties at the time of execution of a document, pertaining to a matter on which the document is silent, evidence as to its nature, factual background or surrounding circumstances may be given when such oral agreement is not inconsistent with or does not contradict the terms of the document. Thus, if the oral evidence adduced by the second defendant in relation to the existence of the purported representation made by Albert Cheok meets the condition stipulated in s. 92(b) of the Evidence Act 1950, then it would be admissible under the said proviso. As such, the effect of the terms of the letter of offer of the overdraft facility should not exclusively be determined within the four corners of the document itself but in the context of the circumstances surrounding the transaction (see *Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight* [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 and *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC).

[15] On this score, I find that the second defendant has failed to adduce any evidence except his aforesaid self serving bare allegation. He did not call the first defendant to the stand to back up his allegation. He also did not make any cogent attempt to call Albert Cheok as his witness. Instead he shifted the burden to the plaintiff to call Albert Cheok to rebut his bare allegation. The initial burden of proof rests throughout the trial on the party on whom such initial burden lies. It is trite that where a party on whom such initial burden lies has discharged such onus, then the evidential burden shifts to the other party. If the party on whom this initial burden rests fails to discharge it, the opposite party need not call any evidence to rebut the allegation (see *Tan Kim*

A *Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147 HC; *UN Pandey v. Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; *Wong Chong Chow v. Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 75 and *Johara Bi bte Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139). Hence, I would hold that the plaintiff need not adduce any rebuttal
B evidence on this issue since the second defendant himself had failed to discharge the initial evidential burden imposed on him.

[16] Furthermore, the second defendant's allegation in regard to the alleged representation to exclude his liability under the facility is, to my mind, unworthy of credit, considering that, under cross-examination, he
C had made the following admission:

> I confirm that this letter IDB 78 was issued to me. I also confirm that I was the principal borrower of the short term loan of RM17 million and that the terms and conditions of this loan are as contained on the letter of offer IDB 78 to 82. I further confirm that I had accepted all
D terms and conditions in IDB 78 to 82. This short term loan was converted to an overdraft facility of RM17 million.
>
> (IDB 6 to 10 dirujuk) I confirm that this letter dated 17.5.96 from Bangkok Bank Bhd to me is a letter which converted the term loan to an O.D. facility. I agree that I was the principle borrower of this O.D.
E facility. I had agreed to those terms and conditions of the O.D facility.

[17] Upon being pressed further the second defendant also admitted as follows:

> I had agreed to be the principal borrower because I had assumed that
F collateral of RM10 million fixed deposit and the lands were enough to pay off the loan.

[18] Hence, the second defendant's evidence clearly shows that he had agreed to accept the plaintiff's offer of the facility, not because Albert
G Cheok had made a representation that he would not be liable in the event of default, but rather because he had assumed that the securities were enough to pay off the loan. I find the second defendant's version to be an afterthought, designed to escape liability.

[19] In this regard, I have to further note that the second defendant's
H allegation that he is not liable under the facility is inconsistent with the terms and conditions of the offer letter. Hence, I would rule as inadmissible, the affidavit and oral evidence of the purported collateral agreement for the purpose of contradicting the terms and condition of the facility agreement which, *inter alia*, had clearly stipulated that the
I second defendant shall be liable under any process of the law for any sum of money found to be payable. Thus, the provisions of ss. 91 and 92 of the Evidence Act are indeed applicable against the second defendant.

[20] A further material point is that the second defendant's evidence must also be weighted against the evidence adduced by the plaintiff. On re-examination by the plaintiff's counsel, PW1 explained how an application for such a large loan was processed before being approved. The loan application would normally be passed to the marketing department of the original plaintiff, wherein a marketing officer would analyze whether the loan is viable. Only thereafter would the application be brought to the loan committee to decide whether to recommend to the board credit committee for approval. Should the board credit committee approve the loan a letter of offer will be issued to the applicant or applicants of the proposed loan. PW1 testified that at the material time Albert Cheok was a non-executive chairman of the bank (original plaintiff) and he alone had no authority to approve the loan. And, if Albert Cheok had no authority to approve the loan he also had no authority to make any representation to the second defendant which binds the plaintiff. In those circumstances it is highly improbable that Albert Cheok would have been bold enough or so presumptious as to make the alleged purported representation to the second defendants. I accept PW1's explanation.

[21] For all the above reasons and having read the cause papers, carefully considered the affidavit and heard oral evidence from both sides, I am entirely satisfied that the plaintiff's claim against the second defendant in encl. 1 ought to be and is now allowed in the amount as earlier agreed, being on the quantum of RM10,653,554.36 as at 30 April 2005 with interest at the rate of 2% per annum above the base landing rate of Malayan Banking Berhad, and 1% per annum above the prescribed rate in respect of the default interest calculated on monthly rests basis. The plaintiff shall also have the costs of this action.